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89-1656

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEPHEN GOOT,

Petitioner,

- vs. -

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant's right to counsel and right of due process pursuant to the Fifth and Sixth Amendments of the United States Constitution violated when the United States Attorney's Office prosecuting the defendant has as the United States Attorney for that office, the attorney who originally served as private defense counsel for the defendant and defendant is not afforded the opportunity of a hearing on his Motion to Disqualify the United States Attorney's Office?

2. Is the defendant's right against cruel and unusual punishment pursuant to the Eighth Amendment of the Constitution of the United States violated when the maximum sentence is imposed against the defendant by the court and said sentence is grossly disproportionate to a more culpable co-defendant, grossly exceeds other sentences imposed on similarly situated defendants, grossly exceeds unenacted sentencing guidelines and is imposed with no comment or rationale given by the trial court?

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October Term, 1989

STEPHEN GOOT,

Petitioner,

- vs. -

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner STEPHEN GOOT, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit issued on January 24, 1990, affirming Petitioner Goot's conviction and sentence.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of

Appeals for the Seventh Circuit, filed on January 24, 1990, is reported at 894 F.2d 231 (1990) and is reprinted as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming Goot's conviction and sentence was issued on January 24, 1990. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C.§ 1954(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the United States Constitution are applicable to this case:

> Amendment 5
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor and to have the assistance of counsel for his defense.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner Stephen Goot, a practicing attorney in Lake County, Indiana was charged on October 20, 1987 with a two count federal Indictment with Racketeering and Conspiracy to Commit Racketeering pursuant to 18 U.S.C. § 1962(c) and (d). He was convicted after a trial by jury on March 24, 1988 and thereafter sentenced to a term of imprisonment of twenty (20) years on each count, said sentences to run concurrently. The defendant was further ordered to pay a fine of Twenty Five Thousand ($25,000.00) Dollars and a

forfeiture of Nine Thousand ($9,000.00) Dollars. Defendant Goot presented eight (8) issues on appeal to the United States Court of Appeals for the Seventh Circuit. The Court on January 24, 1990 affirmed the judgment of the district court. (See Appendix A).

In April of 1984, Defendant Goot retained Attorney James Richmond to represent him. From April 16, 1984 to August, 1985, while under government investigation, he was continously represented by Attorney James G. Richmond. On August 26, 1985, Attorney James G. Richmond was appointed United States Attorney and recused himself from representing Goot and from likewise prosecuting him. He appointed in his stead, Assistant United States Attorney John F. Hoehner as the Acting United States Attorney on this case. Assistant United States Attorney John F. Hoehner was at that time, an assistant to USA Richmond, the United States Attorney for the Northern District of Indiana.

In December, 1987, shortly after the Indictment was returned, Goot filed a timely pre-

trial motion to disqualify the United States Attorney's Office on the grounds that his Fifth Amendment Right of Due Process and his Sixth Amendment Right to Counsel were violated by the prior representations by Richmond. The District Court denied this motion finding that the Indiana Rules of Professional Conduct did not require recusal of the entire United States Attorney's Office for the Northern District of Indiana. The court further denied Defendant Goot the opportunity of a hearing, opportunity to present evidence, and the opportunity to cross-examine witnesses on his motion. The trial court, in denying this request, found that such a "hearing would only be for the purpose of 'going fishing'."

Defendant filed with the trial court a motion entitled "Additional Evidence in Support of Goot's Motion to Disqualify United States Attorney's Office of the Northern District of Indiana From Prosecuting Goot." This documentation included evidence that the United States Attorney's Office had previously recused themselves in a matter related to Defendant Goot and appointed an

assistant United States Attorney for the Southern District of Indiana. The United States Court of Appeals for the Seventh Circuit found this prior disqualification irrelevant to United States Attorney Richmond's office disqualification in prosecuting Defendant Goot. (Appendix A, p.12).

On appeal, Defendant Goot, further argued that the alleged screening claimed by the Affidavits of the United States Attorney's Office were inaccurate in that documents filed by the office contained Richmond's name as United States Attorney. Further, an Affidavit by AUSA Meyer implied that Richmond had recused himself from all Operation Bar Tab matters, an allegation that was in fact inaccurate as provided by a document showing his involvement. The United States Court of Appeals for the Seventh Circuit, although "troubled" by this last aspect, and finding that it "could give rise to an appearance of impropriety" found that a balancing test between the government, defendant, and public negated any indications of improper screening. (Appendix A, p.10-11).

On appeal to the United States Court of Appeals for the Seventh Circuit, Defendant Goot, also argued that his maximum sentence of twenty (20) years was violative of the Eighth Amendment to the United States Constitution.

Defendant Goot was alleged to have participated in a scheme with Deputy Prosecutor Nick Morfas for the improper disposition of drunk driving cases in the Lake County courts of Indiana. Morfas admitted that he forged the Defendant's name on the back of bond checks, stole and destroyed files from the Prosecutor's Office and destroyed court files. Pursuant to a Plea Agreement, Morfas testified that he used Defendant Goot's name as the attorney representing drunk driving defendants in that he was prohibited from the practice of criminal law by his prosecutorial position. Where Morfas was a necessary element to the fruition of these offenses, it would have been impossible for Defendant Goot to have committed any alleged crime without the presence of Morfas.

The government admitted in their argument

that Morfas' conduct was comparable if not more culpable than Defendant Goot when the Assistant United States Attorney stated, "Morfas is just as bad, if not worse, than Goot." Tr., P.1545. Despite this statement, and the evidence of a significantly greater culpability on the part of Morfas, the district court sentenced Morfas to four (4) years and Goot to twenty (20) years.

Defense counsel for Goot requested that the court provide a statement in explanation of this sentence. The District Court, however, failed to comply with Defendant's request and provided no explanation for the sentence imposed. The failure to explain the incongruity in sentence was emphasized on appeal in noting that Defendant Goot's sentence grossly exceeded sentences recommended by the new sentencing guidelines[1] and further exceeded sentences imposed on similarly situated attorneys and judges.

[1]If defendant had been sentenced pursuant to Sentencing Guidelines according to trial counsel, his sentence range would have been between twelve (12) and thirty-eight (38) months. (Tr., sentencing hearing, p.6. See also, Appendix A, p.13 fn.11). It should be noted that a 12-18 month sentence was a sentence noted to the Hon. James Moody by the probation department. (Sentencing Hearing, Tr., p.6, lines 2-7).

Although the United States Court of Appeals for the Seventh Circuit stated that the wise practice was to explain a disparity in sentencing, the imposition of this sentence was not an "abuse of discretion or constitutionally disproportionate." The court emphasized the availability of a motion pursuant to Federal Rules of Criminal Procedure, Rule 35(b), to adjust any improper sentence.

REASON FOR GRANTING THE WRIT

I.

IS A DEFENDANT'S RIGHT TO COUNSEL AND RIGHT OF DUE PROCESS PURSUANT TO THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION VIOLATED WHEN THE UNITED STATES ATTORNEY'S OFFICE PROSECUTING THE DEFENDANT HAS AS THE UNITED STATES ATTORNEY FOR THAT OFFICE, THE ATTORNEY WHO ORIGINALLY SERVED AS PRIVATE DEFENSE COUNSEL FOR THE DEFENDANT AND DEFENDANT IS NOT AFFORDED THE OPPORTUNITY OF A HEARING ON HIS MOTION TO DISQUALIFY THE UNITED STATES ATTORNEY'S OFFICE?

This court should grant the writ in this case

to consider and decide whether the Fifth and Sixth Amendments to the United States Constitution are violated when the United States Attorney's Office prosecuting the defendant has, as the United States Attorney of that office, the attorney who formally represented the defendant. As a result of this case, there now exists a jurisdictional dicotomy on the issue of whether it is appropriate to use a subordinate as a institutional screening mechanism to insulate a superior against charges of conflict of interest.

Indiana's Code of Professional Responsibility, Rule 4, provides that "a lawyer should preserve the confidences and secrets of a client." Canon 9 of the Code provides that "a lawyer should avoid even the appearance of professional impropriety." In interpreting these provisions, Indiana case-law has found that when a prosecutor has formally represented a client, his entire office is subsequently disqualified from prosecuting that individual. See, e.g., Banton v. State, 475 N.E.2d 1160 (Ind.App. 1985); State v. Tippecanoe, 432 N.E.2d 1377 (Ind.App. 1982); State ex rel

Goldsmith v. Superior Court of Hancock County, 386 N.E.2d 942 (Ind. 1979); See also State v. Hardy, 408 N.E.2d 313 (Ind.App. 1980); In re Alexander, 504 N.E.2d 584 (Ind. 1987).

The Supreme Court of Indiana's rationale for disqualifying the entire office when the supervising prosecutor has a conflict has been the fact that a prosecuting attorney "exercises authority and speaks through his deputies" and that the prosecutor has the administrative control over the entire staff. The Indiana courts have found, therefore, the supervisor should not be fully disqualified unless his entire staff was also so disqualified. Tippecanoe, 432 N.E.2d at 1379; State ex rel Goldsmith, 385 N.E.2d at 945.[2]

[2]The United States Court of Appeals for the Seventh Circuit cited to Havens v. Indiana, 793 F.2d 143, 145 (7th Cir. 1986), claiming that there was no Sixth Amendment violation by a prosecutor who had previously represented the defendant when charges were four (4) years apart and unrelated. Note, however, that Havens was not a case of a prosecutor recusing himself and using a subordinate as an institutional screening. There also was no relationship between the prior charges and the present charges that Havens was being prosecuted on. In the case at bar, Goot's present charges were the same charges to which USA Richmond had previously represented Goot.

Other jurisdictions have likewise found that it is inappropriate to use a subordinate as an institutional screening method to insulate a superior of charges of conflict of interest. See, e.g., State v. Dean Foods Products Co., 405 F.2d 380 (8th Cir., 1979); Blair v. Armstrong, 626 F.2d 512 (W.D. Missouri 1985). Even where there is no prejudice shown, the appearance of impropriety necessitates recusal. State v. Cooper, 409 N.E.2d 1070 (Ct of Comm. Pleas, Ohio 1980); See also Satterwite v. State, 357 S.2d 816 (Ala. Ct.App. 1977); Kansas v. Leigh, 178 Kan. 549 289 P.2d 774 (1955).

In People v. Shinkle, 415 N.E.2d 909 (N.Y. 1980), the Court of Appeals of New York reversed a conviction where the attorney who initially represented the defendant was later appointed chief assistant in the office of the prosecutor. Despite screening measures scrupulously used by the office, the court found the insulation insufficient. The court noted that proof of noncompliance with the screening measures was "out

of the defendant's reach" and therefore the inherent impropriety necessitated reversal. Id. at 910.

This position is not endemic to Indiana, Missouri, Ohio, New York and the Eighth Circuit, but is likewise emphasized in a district court opinion in Arizona. Despite the fact that there was no transfer of information, the court in United States v. Catalanotto, 468 F.Supp. 503 (D. Arizona 1978) found that the proper remedy was to disqualify the particular office of the United States Attorney where a conflict existed. The court noted, however, that the matter could still be prosecuted by a different United States Attorney's Office. Id. at 507.

It would appear that this Seventh Circuit decision in United States of America v. Goot, is a decision which takes a position contrary to these aforestated cases. Specifically it is the first case that would appear to find it appropriate to use a subordinate where a superior in the same United States Attorney's Office is excluded as a result of a conflict.

The Seventh Circuit in reaching its result chose to employ a three part test ennunciated in its leading decision of Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983). The Seventh Circuit Court of Appeals admits in reviewing the facts of the case at bar with the Schiessle case that "more could have been done." The court likewise admits that it is troubled by some of the items which would give rise to an appearance of impropriety. (Appendix A, p.10). The court, in resolving these issues, finds that the appropriate methodology to be employed on questions of disqualification is to "balance the respective interests of the defendant, the government and the public." See United States v. O'Malley, 786 F.2d 786 (7th Cir. 1986). The United States Court of Appeals acknowledges that Defendant Goot has a fundamental interest in his Fifth Amendment right not to be deprived of liberty without due process of law and in his Sixth Amendment right to counsel. However, the court fails to employ the necessary strict scrutiny standard that is applicable when there is a finding of a fundamental right as provided by

the Sixth Amendment to the United States Constitution. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

In employing a balancing test, the United States Court of Appeals negates defendant's rights in that the balancing is attempted without a full and complete evidentary hearing. Defendant Goot was denied the opportunity to present evidence, cross-examine witnesses, and receive complete disclosure of the practices in the United States Attorney's office as administered by USA Richmond. The United States Court of Appeals for the Seventh Circuit accepts the rendition of practices as explained by AUSA Milner at oral argument. (Appendix A. p.9). As such, review by this Court is proper to resolve the jurisdictional conflict on supervisor-subordinate disqualification and to likewise provide Defendant Goot with the opportunity to obtain his procedural rights pursuant to the United States Constitution.

II.

IS THE DEFENDANT'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES VIOLATED WHEN THE MAXIMUM SENTENCE IS IMPOSED AGAINST THE DEFENDANT BY THE COURT AND SAID SENTENCE IS GROSSLY DISPROPORTIONATE TO A MORE CULPABLE CO-DEFENDANT, GROSSLY EXCEEDS OTHER SENTENCES IMPOSED ON SIMILARLY SITUATED DEFENDANTS, GROSSLY EXCEEDS UNENACTED SENTENCING GUIDELINES AND IS IMPOSED WITH NO COMMENT OR RATIONALE GIVEN BY THE TRIAL COURT?

This court should grant the writ in this case to consider and decide whether the Eighth Amendment of the Constitution of the United States is violated when the maximum sentence of twenty (20) years on each of two (2) counts is imposed against a defendant in contrast to similarly situated defendants within the jurisdiction and defendants outside the jurisdiction.

In Solem v. Helm, 463 U.S. 277 (1983), the United States Supreme Court affirmed the Court of Appeals reversal of a sentence which was found to be violative of the Eighth Amendment. Solem prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime

committed." Id. at 284. Solem provided that proportionality was not limited to death penalty review. Id. at 288. Rather, it was applicable to all felony prison sentences. Id. at 288-290. Solem established a three prong test for review of sentences, that being (1) the gravity of the offense and harshness of penalty, (2) comparison to other criminals in the same jurisdiction, and (3) comparison with other jurisdictions.

In noting this first factor, it is apparent that defendant's sentence of twenty (20) years is in gross excess to the gravity of the offense and is an unduly harsh penalty. Like Solem, defendant's crime involved neither violence nor threat of violence to any person. Id. at 298. Like Solem, defendant was not charged with the mere underlying offense, but rather with an offense similar to Solem's habitual offense. Defendant could have been charged with state court bribery charges, but use of the prosecutor's discretion resulted in RICO charges. Like Solem's recidivist statute, intended to provide greater penalties, RICO was designed to provide greater

offenses to individuals involved with organized crime. Like Solem's habitual offender offense, one cannot consider the offense, racketeering in the abstract. Id. at 296. Rather, it is necessary to look at the underlying offenses to determine the harshness of this penalty.

The underlying offense of Bribery (Indiana Code 35-44-1-1), is a class C felony in the State of Indiana. It carries a penalty of two (2) to eight (8) years and permits suspension of the sentence. (Indiana Code 35-50-2-6). Clearly, defendant's sentence, had he been charged pursuant to state statute, would have permitted him the opportunity to present mitigating circumstances which could have lowered the maximum of eight (8) years in prison. (Indiana Code 35-38-1-7).

The Racketeer Influenced and Corrupt Organization Act was passed to serve as a blueprint to fight organized crime. Statement of Findings and Purpose, Pub. L.No. 91-452, 84 Stat. 922-23 (1970). Although the extension of this act to individuals who have no involvement with organized crime has persisted and been found

acceptable, the imposition of the maximum penalty on each count in such circumstances warrants review. Unlike many offenses, close scrutiny has been afforded sentencing arguments when a RICO violation was involved. See United States v. Busher, 817 F.2d 1409 (9th Cir. 1987). (RICO forfeiture held violative of the Eighth Amendment). A sentence of twenty (20) years to a minor defendant, with no connection to organized crime, no criminal record, and an exemplary background is comparable to Solem v. Helm's sentence of life imprisonment to a defendant for uttering no account check for One Hundred ($100.00) Dollars with an extensive criminal record. Like this Court's findings in Solem, that such a sentence is unduly harsh, Defendant Goot's sentence requires review and reversal as disproportionate to the gravity of the offense.

In noting similar cases of Racketeering within the Seventh Circuit, it is apparent that Defendant Goot's sentence is grossly disproportionate. Numerous comparable defendants have been convicted of charges similar to

Defendant Goot's. In all of these cases, the attorneys received sentences less than Defendant Goot. This is despite the fact that in the vast majority of these cases the charges against the attorney defendants were substantially greater than Defendant Goot's. See. Appendix B. See also. Brief of Appellant. p.32-34.

In comparing defendant's twenty (20) year sentence to similar defendants outside this jurisdiction, a disparity is also seen. Three (3) sources of comparison are appropriate. Although inapplicable to the case at bar, in noting the recently enacted Sentencing Guidelines, defendant would have received a sentence in the range of twelve (12) to thirty-eight (38) months. (Tr., Sentencing hearing, P.6). Likewise, the 1986 United States Department of Justice, Bureau of Justice Statistics, shows that sentences of Racketeering are in the average of 95.8 months. Id. at 356. (Tabs 5.15, 5.16). Defendant's sentence of Two Hundred and Forty (240) months is grossly disproportionate to this mean. Finally, sentences of judges on similar offenses outside

the Seventh Circuit have been substantially lower than Defendant Goot's. See United States v. Brennan, 629 F.Supp. 283 (E.D. NY 1986).

A disparity is also seen in comparing Defendant Goot's sentence with alleged co-conspirator, Nick Morfas. Morfas, a former deputy prosecutor received a four (4) year sentence. In the case at bar, co-defendant Morfas was, by the government's own admission, the more culpable individual. The government prosecutor, in his closing argument, stated that, "Morfas is just as bad, if not worse, than Goot." Tr., p.1545. Morfas was the prosecutor, the recipient of the funds, and the individual who forged Defendant Goot's name and client's name to various court records. In some cases the clients were those of co-conspirator Morfas and had no knowledge as to who Defendant Goot even was. (Tr., pp. 934-5, 944-5, 950). While Morfas was a necessary element to fruition of these offenses, it would have been impossible for Defendant Goot to have committed any alleged crime without the presence of Morfas. Defendant Goot, unlike Morfas, was a mere

practicing attorney and not a public official. Defendant Goot, unlike Morfas, was not the instigator of any crimes. Even if one were to believe the government's own evidence, Defendant Goot was at best, a tool, used by Morfas to effectuate his unlawful fixing of traffic tickets. As such, the disparity in Morfas' receipt of a sentence of four (4) years and Goot's sentence of twenty (20) years, shows the excessive punishment rendered to Defendant Goot for exercising his Sixth Amendment right to jury trial.

The trial judge in the case at bar, failed to explain his rationale for sentencing. Although said rationale is mandated by the new sentencing act, 18 U.S.C.§ 3553(c), it was not necessitated by prior Seventh Circuit rules. See, e.g., Andrews v. United States, 817 F.2d 1277, (7th Cir. 1987); United States v. Gomer, 764 F.2d. 1221 (7th Cir. 1985). This posture is contrary to the Second Circuit which remanded a sentence imposed prior to the enactment of the new sentencing act, which failed to specify the rationale for the imposition of the sentence. See United States v. Golumb, 754

F.2d 86 (2nd Cir. 1985). The United States Court of Appeals for the Second Circuit has taken a position in contrast to the Seventh Circuit, that a failure to specify reasons was grounds for a remand where there is a possibility that the sentence was augmented as a result of the defendant's decision to stand trial as opposed to pleading guilty. See United States v. Hutchins, 757 F.2d 11 (2nd Cir. 1985).

The United States Court of Appeals for the Seventh Circuit notes that it is an unwise practice to fail to explain to a defendant why a term of sentence is being imposed. (Appendix A, p.14). However, the Seventh Circuit has chosen in this case, as well as in its prior decisions, not to employ the standard of the Second Circuit of remanding a case in order to obtain an explanation of the court's sentencing rationale. This Court should accept and review this case in order to resolve this procedural disparity of these circuits as to the necessity of granting a remand where a trial court fails to explain its rationale on sentencing and said sentence is imposed prior

to the effective date of the new sentencing act. 18 U.S.C. § 3553(c).

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. As to Question One, Petitioner requests that Defendant's conviction should be reversed and the Indictment dismissed, or in the alternative, the matter should be remanded for a hearing on Defendant's Motion to Disqualify the United States Attorney's Office and retrial or dismissal should be granted as a result thereof. As to Question Two, Petitioner's sentence should be set aside and Defendant resentenced by an impartial magistrate.

Respectfully submitted,

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to the effective date of the new sentencing act. 18 U.S.C. § 3553(c).

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. As to Question One, Petitioner requests that Defendant's conviction should be reversed and the Indictment dismissed, or in the alternative, the matter should be remanded for a hearing on Defendant's Motion to Disqualify the United States Attorney's Office and retrial or dismissal should be granted as a result thereof. As to Question Two, Petitioner's sentence should be set aside and Defendant resentenced by an impartial magistrate.

Respectfully submitted,

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Appendix A - Court's Decision.....A-1 - A-18

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In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2179

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN GOOT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 87-CR-110—**James T. Moody**, *Judge.*

ARGUED MARCH 28, 1989—DECIDED JANUARY 24, 1990

Before CUDAHY and MANION, *Circuit Judges*, and HENLEY, *Senior Circuit Judge.**

HENLEY, *Senior Circuit Judge.* This case involves the criminal conviction of an attorney, Stephen Goot, on a two-count indictment, for "fixing" driving-under-the-influence (DUI) cases. One count, under what is commonly called the RICO statute, was for racketeering and the other was a corresponding conspiracy count. *See* 18 U.S.C. § 1962(c)

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* The Honorable J. Smith Henley, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

& (d). For reversal, Goot argues the district court[1] erred in (1) refusing to disqualify the United States Attorney's office; (2) refusing to grant a hearing on the disqualification issue; (3) imposing an improper sentence; (4) excluding impeachment testimony; (5) admitting testimony of others' convictions; (6) denying a motion for acquittal based upon various aspects of the evidentiary proof of a RICO violation; (7) instructing the jury that the Lake County prosecutor's office can be an "enterprise"; and (8) refusing to instruct the jury on the definition of reasonable doubt.

In early 1984 Goot discovered that he was a suspect in Operation Bar-Tab, a federal investigation of the fixing of drunk driving cases in Lake County, Indiana.[2] On April 16, 1984 Goot hired attorney James Richmond to represent him in his defense. Richmond remained Goot's attorney until August, 1985 when Richmond was appointed as the new United States Attorney for the Northern District of Indiana, where Goot was prosecuted.

On October 20, 1987 a grand jury returned an indictment against Goot on both counts.[3] The principal official with whom Goot interacted and conspired was deputy prosecutor Nick Morfas. Goot pleaded not guilty and went to trial; Morfas pleaded guilty and testified against Goot.

The evidence at trial revealed the typical method of operation between Goot and Morfas. A prospective client

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[1] The Honorable James T. Moody, United States District Judge for the Northern District of Indiana.

[2] Operation Bar-Tab has resulted in the conviction of two judges, one judge pro tempore, the Lake County Clerk, two bailiffs, a deputy prosecutor (Goot's codefendant Nick Morfas), and a number of attorneys. A second investigation, Operation Lights-Out, has resulted in the convictions, thus far, of the county sheriff, assessor, two commissioners, and several lesser officials.

[3] The five-year statute of limitations, *see* 18 U.S.C. § 3282, would have run on seven of the eleven predicate acts in Count One within two weeks after the indictment was returned. Two of the remaining four acts already were barred.

would come to Goot after having been arrested and jailed for DUI, and freed by the posting of a cash bond. The defendant would agree to a price for Goot's legal services, with part of the fee to be paid by the bond money. To this end, Goot's new client would give him the bond receipt. Goot then would enter an appearance for his client and file a motion to dismiss pursuant to *Watt v. State*, 249 Ind. 674, 234 N.E.2d 471 (1968).[4]

After filing a *Watt* motion, Goot would inform Morfas about the case and Morfas would steal and destroy the prosecutor's file. Sometimes Morfas would steal and destroy the court's file as well. Once the time for refiling had passed without any further action taken by the prosecutor, Goot would file a second motion to dismiss, which would be granted.[5] A check then would be issued by the prosecutor's office to Goot, the holder of the bond receipt, but payable to the person who initially posted the bond. Goot would give this check to Morfas who would forge the payee's signature and retain the funds as his share in the scheme.

In some cases, Morfas would represent himself to DUI defendants as an attorney, sign Goot's name to the paper

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[4] In *Watt*, the Indiana Supreme Court held that the practice of issuing a traffic ticket was insufficient as a form of charging an offender with a DUI offense under Indiana law, 234 N.E.2d at 474. Thereafter, defense attorneys began filing "*Watt* motions" to dismiss the DUI cases in which only a ticket had been issued. Courts would grant these motions with the condition that the prosecutor refile the cases using an information or affidavit within a thirty to sixty-day period, depending upon the given case. If the prosecutor did not refile on a given case within the allotted time, a second motion to dismiss would be filed and would be granted, dismissing the case outright. Approximately 10% of cases in which *Watt* motions were filed were dismissed.

[5] Evidence admitted at trial indicates that the prosecutor's office and apparently the court system were in such a state of disarray that no one knew why there was a failure to prosecute a given case within the specified period.

work or have Goot sign his name, and then steal the files and collect the fees. Morfas needed to use Goot's name because he could not use his own, being a deputy prosecutor. As a quid pro quo, Morfas either would help Goot with one of Goot's cases or would pay Goot a share of the fees.

The jury found Goot guilty on both counts and he was sentenced to two concurrent twenty-year prison terms (the statutory maximum on each count) and a $25,000.00 fine. Morfas, who was sentenced later, got four years and a $6000.00 fine.

I. Motion to Disqualify

In December, 1987, shortly after the indictment was returned, Goot filed a timely pretrial motion to disqualify the United States Attorney's Office on the grounds that his fifth amendment right to due process and his sixth amendment right to counsel were violated by the prior representation by Richmond. In resisting Goot's motion, the government pointed out that on August 19, 1985, seven days before taking office, Richmond wrote a letter to Assistant United States Attorney Andrew Baker stating that Richmond would recuse himself on all cases in which Richmond had a prior representation, including Goot's. The next day, August 20, Baker advised the Department of Justice of Richmond's recusal. All Assistant United States Attorneys in the Northern District office also were advised of Richmond's recusal. Upon the taking of office, Richmond appointed Assistant United States Attorney John Hoehner to be "Acting United States Attorney" on the Goot investigation. The government also provided to the district court affidavits from Richmond and the Assistant United States Attorneys involved in Goot's prosecution stating that no communications with Richmond had taken place with respect to this prosecution.

In refusing to disqualify the United States Attorney's office, the district court heavily relied on Rule 1.11(c) of

the Indiana Rules of Professional Conduct (IRPC), the set of ethical rules in effect at the time.[6] Rule 1.11(c) reads in pertinent part: "[A] lawyer serving as a public officer or employee shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice . . . ." The comment to this paragraph states that the rule "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." The district court concluded that since other lawyers in the agency could participate, recusal of the entire Northern District office was not necessary. Juxtaposing this conclusion with the screening measures employed by the office, the district court denied Goot's motion. It also denied a request for a hearing on the motion on the ground that a hearing would only be for the purpose of "going fishing."

Goot argues that the district court erred in relying on the IRPC and that it should have relied on the Indiana Code of Professional Responsibility (ICPR), because the IRPC only superseded the ICPR on January 1, 1987—prior to Goot's motion to disqualify, but long after the important facts of this case arose. Specifically, Goot argues that Canons 4 ("A lawyer should preserve the confidences and secrets of a client") and 9 ("A lawyer should avoid even the appearance of professional impropriety") of the ICPR required disqualification of the Northern District office.

For purposes of this case, we discern no real difference between the IRPC and the ICPR. Both either state or imply the ethical principle prohibiting conflicts of interest or even the appearance of one, and neither answers the question whether that principle was violated here. While in general the Indiana Supreme Court has relied upon its ethical rules in requiring complete office recusal in criminal cases, we observe that this court at times has dis-

[6] The district court's local Rule 1(f) provided for adoption of state rules for governing the ethical conduct of attorneys.

tinguished between what may be inappropriate ethical conduct for a prosecutor and what may be a constitutional violation. *Compare State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982) (holding that when the elected prosecutor and not just one of his deputies is disqualified, the entire office must be disqualified) *with Havens v. Indiana*, 793 F.2d 143, 145 (7th Cir.) (finding no sixth amendment violation by prosecutor, who had previously represented the defendant, when charges were four years apart and were unrelated, but nevertheless, chastising the government's ethical decision not to recuse the prosecutor anyway), *cert. denied*, 479 U.S. 935 (1986). Even so, with the added weight of the constitutional right to counsel of choice in a criminal case, the ethical considerations are basically the same and both the district court and this court have a duty to supervise ethical conduct of attorneys. While ethical codes per se may not be dispositive of the outcome of a criminal case, when an actual conflict of interest exists we must examine and weigh the circumstances of the particular case. *See United States v. O'Malley*, 786 F.2d 786, 789-90 (7th Cir. 1986).

The government points out that the Attorney General, as statutorily mandated, *see* 28 U.S.C. § 528,[7] had promulgated rules on recusal and that the procedure followed in this case strictly complied with those rules. *See* United States Attorney's Manual § 1-3.515 ("U. S. Attorney who recuses should promptly notify the appropriate division and . . . the Executive Office for the U. S. Attorneys. In exceptional cases, the recusation of the U. S. Attorney

[7] 28 U.S.C. § 528 states:

> The Attorney General [of the United States] shall promulgate rules and regulations which require the disqualification of any officer or employee of the [United States] Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. . . .

may require the recusation of all members of that office."); *see also* 28 C.F.R. § 0.131 (1988) ("Each U. S. Attorney is authorized to designate any Assistant U. S. Attorney in his office to perform the functions and duties of the U. S. Attorney . . . with respect to any matter from which he has recused himself . . . ."). Finally, an affidavit by Manual Rodriguez, Legal Counsel, Executive Office for the United States Attorneys, asserts that based upon a thorough review of the case, recusal of the entire Northern District staff was deemed unnecessary.

The government's adherence to its standardized procedure and its conductance of an internal review on this issue is commendable and helpful, but it, of course, is not dispositive. The question whether Goot's rights were violated is not left for his adversary to determine, but is for a court of law. We now turn to that determination.

This circuit employs a three-part sequential inquiry in deciding the question whether disqualification of an office is necessary when an attorney has switched from one side to another. *Schiessle v. Stephens*, 717 F.2d 417, 420-21 (7th Cir. 1983).[8] First, does a "substantial relationship" exist between the subject matter of the prior and present representations? Second, if so, has the presumption of shared confidences with respect to the prior representation been rebutted? Third, if not, has the presumption of shared confidences with respect to the present representation been rebutted? *Id.*

The government concedes the first two points: Goot alleges, and Richmond admits, that confidential informa-

[8] The *O'Malley* court declined to employ civil cases in determining the question whether a defense attorney should be disqualified in a criminal case. *O'Malley*, 786 F.2d at 790. However, *O'Malley* was not a case about the effectiveness of screening devices. Rather, the disqualified attorney in *O'Malley* represented both the defendant and a key prosecution witness simultaneously. To the extent that the issue in a criminal case involves the effectiveness of screening an "infected" attorney, the civil cases may provide some useful guidelines.

tion was communicated between them. It is only the third point that is in issue. The government argues that it erected "Chinese walls" between Richmond and the prosecution of this case by Richmond's appointment of Hoehner as the Acting United States Attorney, as verified by affidavits asserting that no secrets were disclosed. Goot argues that the appointment of one's assistant in the same office does not rebut the presumption that confidences were shared.

Indeed, "[a] very strict standard of proof must be applied to the rebuttal of this presumption . . . and any doubts as to the existence of an asserted conflict must be resolved in favor of disqualification." *LaSalle Nat. Bank v. County of Lake*, 703 F.2d 252, 257 (7th Cir. 1983). However, the office under review can rebut the presumption by submitting "objective and verifiable evidence," *Schiessle*, 717 F.2d at 421, which shows that "specific institutional mechanisms" have sufficiently screened the "infected" attorney. *LaSalle Nat. Bank*, 703 F.2d at 259.

The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed. *See Schiessle*, 717 F.2d at 421; *Analytica, Inc. v. NPD Research*, 708 F.2d 1263, 1268 (7th Cir. 1983);[9] *see also LaSalle Nat. Bank*, 703 F.2d at 259 ("screening arrangements were not established until the disqualification motion was filed"). Here, as indicated, screening began before

[9] The *Analytica* court held that when an entire law firm switches from one side to another and a substantial relationship exists between the prior and present representations, an irrebutable presumption arises that confidences were shared. *Analytica*, 703 F.2d at 1268. In such a case, no measure of screening mechanisms could cleanse the taint and disqualification is required. *Id.*

Analytica may be distinguished from the case *sub judice*. Here, the record shows that Richmond's former firm, Goldsmith, Goodman, Ball & Vanbokkelen continued to represent Goot throughout his trial and appeal. Moreover, Richmond comprises only one prosecutor at the United States Attorney's office, albeit its chief.

Richmond took office and culminated with the appointment of Hoehner. The screening mechanisms employed were in accordance with established institutional procedure. Thus, the facts of this case are very different from those of the cited cases which required disqualification.

More specifically, the attorneys of the office were instructed on Richmond's recusal, thus preventing any discussion with him about the case. *LaSalle Nat. Bank*, 703 F.2d at 259. By his recusal, Richmond was prohibited from access to the files on this case. *Schiessle*, 717 F.2d at 421. "[B]oth the disqualified attorney and others in [the office] affirmed these facts under oath," *LaSalle Nat. Bank*, 703 F.2d at 259; and, moreover, the office instituted the screening mechanisms as soon as the "disqualifying event occurred." *Id.*

We agree with Goot that more could have been done. During oral arguments the government conceded that the case files conceivably could have been accessed by the United States Attorney at night or on weekends. The practice of maintaining locked case files with keys distributed to a select few has been cited previously by this court as a substantial screening mechanism. *Id.* Likewise, the codes necessary to access pertinent information on electronic hardware must remain secret. Nevertheless, the absence of one or both of these mechanisms would not render infirm the screening mechanisms employed in this case.

Goot argues that there are several indications that Richmond was not screened. First, materials filed with the court were submitted in the name of James Richmond, United States Attorney, but signed by John Hoehner, *Assistant* United States Attorney. Second, some materials submitted by the government are in the name of Richmond, as above, but signed by Assistant United States Attorney Kevin Milner. Hoehner's name does not appear on these latter materials. Finally, Goot points out that Assistant United States Attorney James Meyer's affidavit, submitted in resistance to Goot's motion to disqualify,

stated "In this respect, Mr. Richmond told me that he had recused himself in all aspects of the 'Bar-Tab Investigation,' " but that a government information submitted to the same court below against another Operation Bar-Tab defendant was personally signed by Richmond, the implication being that Richmond indeed was involved in Operation Bar-Tab.

We address each point in tandem. As is common in busy legal and lay offices, the paper supply is preprinted and the word processors are preprogrammed to include certain information that always appears on formal documents (*e.g.*, a law firm's letterhead). During oral arguments the government explained that Richmond's name is preprinted on various forms that are used daily by the staff. We conclude that the government's failure to remove Richmond's preprinted name should not be construed as more than clerical inattention on its part. We suggest closer attention.

Likewise, the appearance of Milner's name, instead of Hoehner's, is hardly surprising. The record shows that Milner tried the case below and he, in fact, argued the appeal before this panel. We note that Hoehner's appointment as Acting United States Attorney with respect to Goot's case did not mean Hoehner had to proceed in its prosecution without the assistance of his subordinates.

We are more troubled by Goot's third point. A fair reading of Meyer's affidavit suggests that the term "In this respect" refers to Richmond's recusal on the Goot case specifically, and not to a recusal on Operation Bar-Tab in *every* respect. As such, there is no implication of prejudice to this defendant. *See United States v. Caggiano*, 660 F.2d 184, 188 (6th Cir. 1981), *cert. denied*, 454 U.S. 1149 (1982). Richmond's own affidavit supports this conclusion. Nevertheless, there is some ambiguity with this wording, and a notion that Richmond was involved in Operation Bar-Tab at all could give rise to an appearance of impropriety. We note, however, that Operation Bar-Tab was a large investigation. *See supra* n.2. The rec-

ord indicates that the Operation Bar-Tab defendant against whom Richmond signed an information was not a codefendant of Goot. Goot does not allege otherwise. Thus, we reject as dispositive Goot's argument that there are indications Richmond was not screened.

In deciding questions of disqualification we balance the respective interests of the defendant, the government, and the public. *O'Malley*, 786 F.2d at 790. Goot has a fundamental interest in his fifth amendment right not to be deprived of liberty without due process of law and in his sixth amendment right to counsel. *See id.* The government has an interest in fulfilling its public protection function. To that end, the convenience of utilizing the office situated in the *locus criminis* is not lightly to be discarded. Furthermore, the government has a legitimate interest in attracting qualified lawyers to its service. *LaSalle Nat. Bank*, 703 F.2d at 258.

However, we also note that not unfavorable to Goot is the government's interest in sustaining public confidence in its high level of integrity by dealing fairly, both in fact and in appearance, with criminal defendants. The public has an interest in assuring that government is not corrupt and that public officials, officers of the court such as Goot, and others who are responsible for corrupting government are fairly and promptly tried for their alleged crimes. Balancing these interests, and despite some disquieting aspects of the record, we hold that the measures employed by the government sufficiently screened Richmond from the prosecution of Goot so that each and every particular interest of Goot, the government, and the public was met.

II. Request for a Hearing

Goot argues that the district court erred in not granting him a hearing on the disqualification issue. An evidentiary hearing on recusal is useful but not always required. *See United States v. O'Malley*, 786 F.2d at 793 (upholding the disqualification of criminal defendant's counsel who

had previously represented a key government witness). Goot does not make a substantial showing that any actual disclosure took place or that he was prejudiced in any way. Furthermore, the record shows that the issue was well-briefed by both sides. Nevertheless, Goot claims that a hearing was required because procedural irregularities occurred in that the prosecutor's office of the Northern District first recused itself, but later reversed that decision and resumed the prosecutor's role.

The record shows that the government sought to disqualify Richmond's former firm from its representation of Barry Sherman, a key witness in this case and Goot's former law partner. For this purpose only, the Justice Department appointed Assistant United States Attorney for the Southern District of Indiana, David Ryan. In pursuing the disqualification of Sherman's counsel, Ryan had to question the propriety of the same firm's representation of Goot. By using Ryan for this purpose, the Northern District was not required to question the propriety of its own chief's prior acts when he represented Goot. We, therefore, agree with the district court that the Northern District's recusal in moving to disqualify Sherman's counsel was irrelevant to the question whether the Northern District should have recused itself with respect to the Goot prosecution.[10]

III. Disproportionate Sentence

Goot argues that he received a harsher sentence than his more culpable codefendant, Nick Morfas, and relies in part on *Solem v. Helm*, 463 U.S. 277 (1983), which holds that in some circumstances sentences that are disproportionate to the crime may be in violation of the eighth amendment.

[10] Other irregularities cited by Goot as requiring an evidentiary hearing were not presented to the district court, but we, nevertheless, have addressed them elsewhere in this opinion.

In general, it may be said that district courts are given broad discretion in sentencing and that absent an abuse of that discretion the sentence will not be overturned on appeal. *United States v. Cardi*, 519 F.2d 309, 311-12 (7th Cir. 1975). Successful challenges to the proportionality of particular sentences shoud be "exceedingly rare." *Hutto v. Davis*, 454 U.S. 370, 374 (1982). Indeed, a sentence that falls within statutory limits generally will not be overturned. *United States v. Tucker*, 404 U.S. 443, 447 (1972). The sentences imposed here were the maximum in each case but fell within statutory limits.

The district court, however, must avoid not exercising "any discretion at all in imposing the sentence." *United States v. Griffin*, 827 F.2d 1108, 1118 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988). "[W]here the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity." *United States v. Wiley*, 278 F.2d 500, 503 (7th Cir. 1960); *see also United States v. Ely*, 719 F.2d 902, 907 (7th Cir. 1983) (when a judge "sentences similar offenders to greatly disparate terms for the same crime, without any explanation, an inference arises that he failed to exercise his discretion"), *cert. denied*, 465 U.S. 1037 (1984).

In this case, the district court did not give its reasons for imposing the statutory maximum.[11] The government notes that without help from Morfas they would not have been able to convict Goot. The government also reasons that while the district court did not give its reasons when

[11] The sentencing transcript reflects that, prior to the court's rendering the sentence, Goot's attorney requested the court to explain any imposition of sentence greater than what the new Sentencing Guidelines would have required were they effective at the time with respect to this case. Goot's attorney estimated a prison term of between 12 and 38 months under the Guidelines.

sentencing Goot, it likely adopted the arguments made by the government during the sentencing hearing. Finally, during oral argument the government assured this court that as a standard practice it always asks for the statutory maximum in RICO violations and that Goot was not singled out for a stiff sentence for going to trial. Goot asserts that he was less culpable than Morfas who received a total of four years. Morfas was a public official who stole and destroyed records, forged signatures, and was at the center of the operation. Without him, Goot could not have committed the crime, but Morfas, who was able to obtain clients of his own, conceivably could have committed the crime without Goot. Goot urges that *Wiley* therefore requires reversal of the sentence.

A district court always should tell a defendant why a term is being imposed. Indeed, if the criminal acts in this case took place today, the sentencing court would be required to "state in open court the reasons for its imposition of the particular sentence. . . ." 18 U.S.C. § 3553(c). But required or not, the practice is wise.

Nevertheless, we note that in *Wiley* the defendant was sentenced only four days before his equally culpable and more culpable codefendants. *Wiley*, 278 F.2d at 501. In the present case, Goot was sentenced approximately one month before Morfas. We are unwilling to impose on the district court a duty of anticipating the reasons for sentencing it will state when it has a codefendant before it. Such a rule would impose an onerous burden upon the district judge. Goot's sentence, as the government's argument at the sentencing hearing reveals, is comparable to the 15-year and 20-year sentences imposed on two other Operation Bar-Tab defendants. Furthermore, it is possible that Goot's sentence is not too long, but Morfas's is too short.[12] In

[12] Goot's sentence appears to be somewhat longer and Morfas's shorter than sentences imposed on some judges who have accepted bribes. *See United States v. Brennan*, 629 F. Supp. 283 (E.D.N.Y.

(Footnote continued on following page)

present circumstances, we hold that Goot's sentence is within the statutory range and its imposition was not shown to be either an abuse of discretion or constitutionally disproportionate.

However, what we hold with respect to length of sentence is not to be considered as prejudicial to any adjustment that is due. The offenses committed in this case took place prior to November 1, 1987. Thus, under the version of Rule 35(b) of the Federal Rules of Criminal Procedure in effect for this case,[13] Goot may move for a reduction of his sentence, and if such a motion is timely filed we are confident that the district court will consider it with an open mind and adjust the sentence if persuaded that the circumstances call for a reduction. *Cf. United States v. Turner*, 864 F.2d 1394, 1401 (7th Cir. 1989) (per curiam).

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[12] *continued*

1986) (Weinstein, J.) (sentencing state court judge to two consecutive five-year sentences for acceptance of numerous bribes over the course of many years); *id.* at 301 (noting trend of ten-to-fifteen year sentences for judges convicted in Greylord prosecutions in the Northern District of Illinois). The conduct of a judge or other public official who joins in a bribery scheme, and thus abuses the public trust by allowing the judicial process to be corrupted, might be considered at least as reprehensible as the conduct of an attorney engaging in similar conduct.

[13] Rule 35(b) reads:

> **Reduction of Sentence.** A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. . . .

Fed. R. Crim. P. 35(b), Rule Applicable to Offenses Committed Prior to Nov. 1, 1987. The current version of Rule 35, effective for cases in which offenses were committed on or after November 1, 1987, does not allow a defendant to seek a reduction of sentence. *See* Fed. R. Crim. P. 35 (as amended by Pub. L. 98-473).

IV. Refusal to Allow Goot to Present a Witness

Goot argues that the district court erred in sustaining an objection that prevented him from putting a witness on the stand who would have testified that he gave Morfas $3000.00 for fixing his DUI case, not $1000.00 as Morfas had testified on cross-examination. However, "[t]he rule in this circuit is that a witness may not be impeached by contradiction as to collateral matters elicited on cross-examination." *United States v. Rovetuso*, 768 F.2d 809, 817 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986); *see also* Fed. R. Evid. 608(b).

V. Admission of Prejudicial Testimony

Goot next argues that the district court erred in allowing witnesses to testify about the convictions of judges in fixing DUI cases, because such testimony prejudiced the jury against him. This testimony was elicited in response to Goot's having implied on cross-examination that the judges would have noticed any alleged improprieties. The judges' convictions were brought out in redirect examination to show that Morfas and Goot had the opportunity to perpetrate their crimes because of the general climate of corruption in the Lake County court system. We hold that the admission of this testimony was within the district court's discretion. *United States v. Serlin*, 707 F.2d 953, 959 (7th Cir. 1983).

VI. Sufficiency of Evidence

Goot argues that the district court erred in denying his motion for acquittal in that there was insufficient evidence to prove the underlying predicate acts to sustain a RICO violation or to show a nexus with the "enterprise."

To sustain a RICO violation the government had to prove at least two predicate acts. Predicate acts one through nine were based on bribing a public official in violation of the Indiana Bribery Act. *See* Ind. Code § 35-44-1-1(a)(1). Acts ten and eleven were based on Goot's taking a bribe,

the theory being Goot aided Morfas in getting bribes in violation of the same Act. *See id.* § 35-44-1-1(a)(2); *see also id.* § 35-41-2-4 ("A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ."). Allowing the government all reasonable inferences from the evidence, we conclude that a rational jury could have found Goot guilty. *United States v. Garner*, 837 F.2d 1404, 1422 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 2022 (1988).

Furthermore, although Goot asserts that his alleged acts affected his clients only and not the prosecutor's office, by bribing Morfas to steal the prosecutor's files Goot rendered it virtually impossible to prosecute Goot's clients. Thus, we hold that the government proved that the predicate acts had an effect on the "enterprise," the Lake County Prosecutor's Office. *See United States v. Yonan*, 800 F.2d 164, 167 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987). We conclude that the district court did not err in denying Goot's motions for acquittal.

VII. The Prosecutor's Office as an "Enterprise"

Next, Goot argues that the district court erred by instructing the jury that the prosecutor's office can be an "enterprise" for RICO purposes. However, this argument already has been foreclosed, *see, e.g., Yonan*, 800 F.2d at 167, and we decline Goot's invitation to reconsider this precedent.

VIII. Requested Instruction on "Reasonable Doubt"

Since the filing of appellant's brief, the United States Supreme Court denied a petition for a writ of certiorari to review the decision in *United States v. Littlefield*, 840 F.2d 143 (1st Cir.), *cert. denied*, 109 S. Ct. 155 (1988). Consequently, in his reply brief, Goot has abandoned his last argument that the court erred in not appropriately instructing the jury on the definition of "reasonable doubt." *See, e.g., United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988).

As indicated, without prejudice to such modification, if any, as may result from a timely filing of a motion for reduction of sentence under Fed. R. Crim. P. 35, the judgment of the district court is affirmed.

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Appendix B

From J. Tuohy and R. Warden, GREYLORD: JUSTICE CHICAGO STYLE (1989)

OPERATION GREYLORD-CONVICTED ATTORNEYS
AS OF JUNE 1, 1988

Defendant	Position	Conviction	Sentence
Hugo Arquillo	Attorney	Pleaded guilty Dec. 16, 1987 to two tax counts.	2 months work release, $1,300 fine, 3 years probation 200 hours community service
Lee Barnett	Attorney	Pleaded guilty Jan. 15, 1987, to one racketeering/conspiracy count and one mail fraud count.	6 months prison, 2 years probation
Lebert D. Bastianoni	Attorney	Pleaded guilty July 6, 1987, to two tax counts	30 days work release $5,000 fine, 4 years probation, 500 hours community service, ordered to pay back taxes and penalties

Harlan Becker	Attorney	Convicted Feb. 17, 1987, on two tax counts. Pleaded guilty Nov. 6, 1987, to one racketeering/conspiracy count and one racketeering/bribery count.	6 years prison, $60,000 fine, 5 years probation, ordered to pay $63,000 in back taxes and penalties
Jerry B. Berliant	Attorney	Pleaded guilty April 15, 1985, to three tax counts	20 weekends in jail, 3 years probation
Neal Birnbaum	Attorney	Pleaded guilty Oct. 14, 1987, to one racketeering/conspiracy count, one racketeering/bribery count, and one mail fraud count	(Sentencing pending)
Dale Botan	Attorney	Pleaded guilty Mar. 23, 1988, to four misdemeanor tax counts for failure to income tax returns.	(Sentencing pending)
Howard M. Brandstein	Attorney	Pleaded guilty Sept. 19, 1986, to one racketeering/conspiracy count and one tax count.	1 year and one day prison, $56,000 forfeiture 5 years

			probation 200 hours community service
Houston Burnside	Attorney	Pleaded guilty June 5, 1985, to three tax counts.	30 weekends in prison, $3,000 fine 3 years probation
Bruce L. Campbell, Jr.	Attorney	Pleaded guilty Feb. 4, 1987, to one racketeering/bribery count and tax count.	1 year prison, 6 months of which is work release; 5 years probation
James I. Canoff	Ass't. Corporation Counsel	Pleaded guilty April 17, 1984, to one racketeering/bribery count, 18 mail fraud counts, and one obstruction of justice count.	6 months work release, 300 hours community service, $5,000 restitution to the City of Chicago
James J. Costello	Attorney	Pleaded guilty July 18, 1985, to one racketeering/bribery count and one mail fraud count.	8 years prison, $100, fine 5 years probation

Robert Daniels	Attorney	Convicted Feb. 17, 1987, on two tax counts Pending trial on one racketeering/bribery count and one racketeering/ conspiracy count.	6 years prison
Vincent E. Davino	Attorney	Pleaded guilty Jan. 16, 1987, to one racketeering/ conspiracy count and one mail fraud count.	4 years, 5 years probation 500 hours community service
Thomas M. Del Beccaro	Attorney	Pleaded guilty April 11, 1986, to two mail fraud counts.	90 days in prison, later revoked; $1,000 fine; 5 years probation
Thurman Gardner	Attorney	Pleaded guilty April 1, 1985, to four tax counts	6 months prison, 3 years probation, 750 hours community service
Richard H. Goldstein	Attorney	Pleaded guilty Feb. 4, 1987, to one racketeering/conspiracy count and one tax	1 year prison, 4 months of which is work release; 5

		count.	years probation; 400 hours community service
Alphonse C. Gonzales	Attorney	Pleaded guilty, June 25, 1986, to two tax counts and on July 8, 1986, to one extortion count.	3 years prison, later reduced to 1 year; $2,000 fine; 5 years probation, 400-hours community service
William H. Kampenga	Attorney	Pleaded guilty Mar. 23, 1988, to two tax counts	(Sentencing pending)
Melvin Lanter	Attorney	Pleaded guilty Dec. 17, 1986, to one racketeering/bribery count.	90 days work release, $25,000 fine, 5 years probation, 400 hours community service
Edward Kaplan	Attorney	Pleaded guilty Jan. 28, 1985, to three tax counts.	2 years prison, 5 years probation

Paul G. Kulavski	Attorney	Pleaded guilty March 18, 1985, to two tax counts	3 months prison, 5 years probation, 400 hours community service
Bernard N. Mann	Attorney	Pleaded guilty Feb. 25, 1987, to one racketeering/bribery count and one tax count.	6 months prison, $25,000 fine, 5 years probation, 400 hours community service
Joseph F. McDermott	Attorney	Pleaded guilty Dec. 10, 1986, to one racketeering/bribery count and one tax count	1 year and one day prison, $30,000 fine, 5 years probation
Ralph E. Mecvk	Attorney	Pleaded guilty July 6, 1987, to two tax counts.	30 days work release, $5,000 fine, 4 years probation, 500 hours community service, ordered to pay back taxes and penalties
Jay I. Messinger	Attorney	Convicted May 8, 1984, on one mail fraud count.	2 years prison, $1,000 fine

James E. Noland	Attorney	Pleaded guilty March 27, 1987, to one racketeering/bribery count and one tax count.	15 months prison, $15,000 fine, 5 years probation, 400 hours community service
Edward E. Nydam	Attorney	Pleaded guilty April 29, 1985 to two tax counts and on Feb. 25, 1986, to one mail fraud count.	6 months prison, 5 years probation (on tax counts only)
James L. Oakey	Attorney, Former Associate	Convicted May 15, 1987, on two tax counts. Pending trial one racketeering/ bribery count and one racketeering/ conspiracy count.	18 months prison, $5,000 fine, 5 years probation, ordered to pay back taxes and penalties
William F. Reilly	Attorney	Pleaded guilty March 27, 1987, to one racketeering/bribery count and one tax count.	14 months prison, $5,000 fine, 5 years probation, 400 hours community service

Bruce Roth	Attorney	Convicted Aug. 24, 1987, on two extortion counts, one racketeering/ bribery count, and one racketeering/conspiracy count.	10 years prison, 5 years probation
Martin Schachter	Attorney	Pleaded guilty July 5, 1986, to one mail fraud count.	4 years probation
R. Frederic Solomon	Attorney	Pleaded guilty April 8, 1986, to four tax counts.	2 1/2 years prison, 5 years probation
Dean S. Wolfson	Attorney	Pleaded guilty Jan. 25, 1985, to one racketeering/bribery count and three mail fraud counts.	7 1/2 years prison, $3,000 fine, 5 years probation
Cyrus Yonan, Jr.	Attorney	Pleaded guilty May 14, 1987, to one racketeering/bribery count and two tax counts.	1 year and one day prison, $15,000 fine, 3 years probation, 400 hours community service ordered to pay $12,300 in back taxes and penalties

Arthur Zimmerman	Attorney.	Pleaded guilty Dec. 22. 1987. to two to counts.	3 years prison. $10.000 fine. 4 years probation. 300 hours community service